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# COOPERATIVE WORK PROGRAM OF THE NORTH AMERICAN AGREEMENT ON LABOR COOPERATION (NAALC)

## CANADA-UNITED STATES-MEXICO TRIPARTITE CONFERENCE ON "INDUSTRIAL RELATIONS FOR THE 21ST CENTURY"

*"NAFTA, AMERICAN LABOR LAW AND THE IDEA OF INTERNATIONAL LABOR STANDARDS"*

**Delivered by:**

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Thank you Ms. Deom. Distinguished participants, ladies and gentlemen.

It is a pleasure to join this group of friends from Mexico and Canada here in Montreal. I am pleased to have the opportunity to address this tripartite group because I strongly believe the work you are doing to support international labor standards, worker rights and free trade among three good neighbors is very important. Recognizing labor standards and realizing them in actual practice are essential elements of free trade policy because without economic and social progress for working women and men, there is no legitimate purpose for free trade.

From June 1990 when the presidents of Mexico and the United States agreed to begin negotiations for a free trade agreement, until the fall of 1993 when the treaty and its side agreements were approved by Canada, Mexico and the United States, events have moved very quickly. Administrative offices were established in the labor departments of each country and trade, environmental and labor secretariats have been established in Mexico (trade), Canada (environment) and the U.S. (labor). Many tripartite meetings have been held, and charges have been filed and investigated pursuant to the labor side agreement against three companies operating in Mexico and against one in the U.S.

Despite Mexico's economic crisis of 1995, the dire loss of U.S. jobs predicted by opponents of NAFTA has not occurred. Fortunately, the U.S. economy has been increasingly strong during the entire period since NAFTA became effective. The labor side agreement has been implemented quickly in each country and will serve the key purpose of keeping attention focused on the importance of constructively implementing labor rights in our three countries.

Successfully implementing the NAFTA labor side agreement is critically important to workers, unions and employers in Canada, Mexico and the United States. Moreover, its influence on the course of trade and labor rights throughout the hemisphere will echo for many years to come. The success of NAFTA can also influence the course of trade and labor standards in the increasingly global marketplace where national borders are rapidly losing their significance, and it focuses renewed attention on this century's attempts to reconcile free trade with effective international labor standards.

Today, as we approach the millennium, there is more discussion around the world of linkages between trade and labor standards among unions, governments, and progressive employers. The European Union has been grappling for many years with many of the same issues that are encompassed by NAFTA and the side agreements. Technological developments in telecommunications and computers that are shrinking the globe, combined with the elimination of trade barriers between nations, are accentuating concerns about labor cost differentials and labor rights.

These have been matters of international focus ever since the International Labor Organization was created in 1919. Experience since then teaches that assuring worker rights and labor standards around the world is a long and complicated process which cannot be accomplished simply by including a clause in a trade agreement or passing more ILO conventions whose aims are laudable but whose effects are hard to detect in the workplaces of the world. Labor standards are intertwined with progress toward democratic political rights, women's rights, economic development, environmental concerns, differences in national cultures and histories, geopolitical realities, conflicting religious customs and taboos and national security considerations. Worker rights must compete for attention with all these concerns and others as well.

Labor standards have become increasingly prominent in recent GATT negotiation rounds, and the United States has incorporated labor standards provisions in several pieces of trade legislation. For instance, in 1994 President Clinton signed a law requiring U.S. representatives to the World Bank and other multi-lateral lending institutions to press for the inclusion of human and labor rights provisions in their developmental loan agreements. Several companies, most notably, Levi-Strauss, have adopted their own labor rights policy guidelines applicable to the plants producing their goods in the U.S. and throughout the world.

In the U.S., the debate continues over the extent to which we can link human rights and trade with China, a dilemma with no easy or apparent answer, to me at least. World trade would be severely curtailed to the detriment of all nations if it were conditioned directly on all of the very worthy issues of concern to the citizens and governments of our global trading partners. However, it must be recognized that labor rights are more fundamentally related to trade than some of the other issues that various groups try to make conditions of free trade.

In the current U.S. presidential primary elections, trade issues are polarizing Republican candidates and voters more than at any time in recent memory. One of the candidates is making his opposition to U.S. participation in NAFTA and other trade agreements a major component of his isolationist campaign themes which unfortunately appeal to a significant segment of U.S. voters. This then is the background against which NAFTA is being implemented.

NAFTA offers a unique opportunity for our three democratic countries to work cooperatively to prove that free trade and worker rights can be mutually supportive goals. To succeed, NAFTA must serve the interests of workers and employers in all three countries. It cannot succeed or serve as a model for wider free trade and worker rights in the hemisphere or elsewhere in the world unless it brings progress for workers and employers in all three countries. Without increased employment, without economic progress, widely and equitably shared, and without commonly accepted worker rights, free trade cannot be embraced by our democratic societies.

Mexico, Canada and the United States have much in common. We are all industrial democracies where workers' rights to organize and bargain collectively over wages, hours and working conditions are protected by law. Our industrial relations systems have much in common as well as some significant differences.

The right to strike is protected but also regulated in each country. This policy reflects a balanced approach to federal labor policy in the United States and one which emphasizes both rights and obligations for labor and management in the United States.

This approach is reflected vividly in a recent decision of the Board, involving the secondary boycott prohibitions contained in our National Labor Relations Act's Taft-Hartley amendments, Coastal Stevedoring Company.[1] In this case the ILA in the U.S. requested secondary action by Japanese unions because of a dispute with non-union employers in my country. In a cursory analysis -- rendered just a few months before I came to Washington to head the agency -- the Board said that the Japanese unions were agents of their American counterparts. The Court of Appeals for the District of Columbia quite properly, in my view, held that the Board had not found agency establishing a relationship between the American and Japanese unions. Said the court:

> . . . [t]he ILA and the Japanese unions are completely independent entities, bound together only by the fact that both seek to further the goals of organized labor worldwide. We discern nothing in the law of agency to support a theory transforming one union into the agent of another based upon the spirit of labor solidarity alone.[2]

I think that the court was right and the Board was wrong. But my view is that agency could have been established through apparent authority manifested by the Japanese unions -- but the problem is that the Board did not employ this analysis. In any event, in future cases the Board will be called upon to examine the secondary boycott issue and, ultimately, the question of whether the National Labor Relations Act applies extraterritorially as well as domestically. But Coastal Stevedoring Company, arising as it does under American law, dramatizes the inevitable consideration of all labor standards which involve both rights and obligations for both labor and management.

The predominant pattern in each NAFTA country is bargaining at the plant level or employer level by a single union which serves as the exclusive representative of all employees in the bargaining unit. In each country, industry-wide bargaining occurs but is less common than plant level or employer level bargaining.

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1 313 NLRB 412 (1993).

2 56 F.3d 205; 213 (D.C. Cir. June 6, 1995). Cf. William B. Gould IV, *Multinational Corporations and Multinational Unions: Myths, Reality and the Law*, 10 INTERNATIONAL LAWYER 655 (1976).

In my opinion, our three countries' arrangements in which the predominant bargaining structure is exclusive representation by a single union in each manufacturing plant or appropriate bargaining unit offers significant advantages over industrial relations systems that fractionate the workforce in a single plant into several unions organized by occupation as in the United Kingdom and Australia or those that provide for multiple unions allied with different political parties as in Spain, Italy and France. The system in Germany is still different. It combines broad industry-wide unionization and collective bargaining with works councils that function at the employer and plant level. In Japan the most important relationships are at the employer level.

Systems which compartmentalize and freeze an employer's workforce into rigid occupational groups complicate the collective bargaining process, make organizational change more difficult, discourage the broadening of skills through training and impede the workforce flexibility, teamwork and employee participation that are the hallmark of successful industrial organizations throughout the world today. So, as each country approaches labor law reform in its own way, it will be critical not to lose the important structural advantages shared by our industrial relations systems.

Thus, there is no one single perfect system best for all countries. There must be adjustments for the history and culture of each country. However, recent history indicates that the systems which embody labor-management cooperation as part of the collective bargaining system, as in Japan, are more effective in a highly competitive global economy than those that are oriented exclusively toward adversarial conflict.[3] Collective bargaining must accommodate itself to more sharing of information and, in so doing, promote a rational dialogue in its wake. Teamwork systems, quality systems and the like are being implemented quite successfully by an increasing number of companies and unions following the path of NUMMI and SATURN and the UAW as Japanese-style labor-management relations concepts are adapted to each country's conditions.

Our three countries share the common situation, especially in the United States where remedies are deficient and procedures laborious, that labor rights are not perfectly realized. We can all improve, but the task is not easy. Labor law reform efforts in the United States failed in 1978 and again in 1994. In each instance powerful interests lined up to defeat constructive proposals for more effectively implementing policies contained in our National Labor Relations Act these past 61 years.

In the United States, unions complain with some justification that the law and courts too often are used to delay, deny and frustrate worker rights. In some instances this is possible because the National Labor Relations Board does not have enforcement powers independent of the courts. This means that an employer or union sometimes resist Board orders by lengthy appeals in the federal courts. As Chairman of the Board,

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[3] See W.B. Gould IV, *Japan's Reshaping of American Labor Law* (MIT Press) 1984.

I am attempting to initiate rulemaking as a substitute for detailed litigation so that we can expedite our representation procedures, thus insuring prompt and inexpensive resolution of disputes for both employees and employers.

Unions in the United States also point to the fact that the sanctions provided in the National Labor Relations Act are not severe enough to deter recalcitrant employers bent on unlawfully denying worker rights to organize and bargain collectively. Those employers who fire union organizers in order to frighten their workers from voting in favor of union representation can only be required by the National Labor Relations Board to rehire the dismissed workers and make them whole for wages lost minus interim earnings. Frequently a long court battle delays even this mild remedy until long after the union's representation election campaign has died. The National Labor Relations Act does not provide for fines or more effective sanctions even for the most egregious and willful violations of worker rights to organize and bargain collectively.

Our statute does provide for injunctive relief which the Board has used more frequently since the new Board members and General Counsel were confirmed in March of 1994. We have authorized injunctions more frequently than any previous Board where, amongst other considerations, delay for normal procedures would result in irreparable damage to worker rights to organize and bargain collectively.

Another area of current concern to the parties at interest under our respective countries' labor laws is the status of various employee involvement efforts which are becoming increasingly common in U.S. industry. The National Labor Relations Act since its passage in 1935 has contained a provision designed to prevent employers from creating and dominating sham labor organizations, the company unions which were instigated in the 1930s by some employers to forestall authentic, independent unionization efforts by their employees. In recent years there have been several cases in which charges of violations of this provision have been brought against employers and upheld by the NLRB and the courts. The current debate in the United States is over how or whether the law can and should be amended so that it will not discourage legitimate employee involvement in efforts to improve productivity and product quality and teamwork without opening the door to the creation and domination of sham unions by anti-union employers. Some employers' organizations support amending the law to remove any restrictions on cooperative programs with employees, while unions dispute the need for any change in the law. My own position for many years has been that the law should be changed to permit legitimate, autonomous employee committees or work teams whose purpose is to improve productivity and quality but which are not designed to forestall or supplant trade unions. It is noteworthy that the Clinton Board, through its decisions in several cases, has promoted the legality of such employee committees and cooperative efforts, consistent with existing law.

A final troublesome area in the United States with the effective implementation of labor rights is the difficulty or failure that many unions and employers have in negotiating initial collective bargaining agreements after the workers vote in an NLRB

certification election to be represented by a union. Some anti-union employers, after a union is certified, continue to resist their obligations under the National Labor Relations Act and refuse to bargain in good faith with the union which has been certified. Sometimes they engage in what is termed "surface" bargaining in a effort to avoid being charged with an unfair labor practice. The Dunlop Commission pointed to the relatively high number of cases where the parties never reach an initial collective bargaining agreement following the certification of a union, which of course means that the collective bargaining is effectively nullified.

Here is an area where the U. S., in my opinion, should consider adopting the Canadian practice of requiring arbitration of initial collective bargaining agreements if the parties fail to reach an agreement themselves after a specified period of time.[4] In Canada, in these situations, the arbitrators are guided in their rulings by contract provisions which are common in the industry and area. My understanding is that this has been an effective procedure which may have been a factor in a much higher rate in Canada than in the United States of actual consummation of collective bargaining relationships following union certification. Adoption of this approach in the U. S. would of course require a change in our statute, which is unlikely at the present time.

Most of the opposition to NAFTA in the United States comes from unions in the manufacturing sector who fear that plants will be closed and moved to Mexico in order for employers to take advantage of lower labor costs. In support of their opposition to NAFTA, unions in the United States attribute low wages in Mexico in part to imperfections in the collective bargaining system there. Specifically, we hear complaints that the unions' lack of independence from the ruling party prevents them from effectively representing their members' interests in collective bargaining and in the development of government wage-price policies. It is said that the ruling party and government use the unions as a mechanism to control and channel labor unrest and that "establishment" unions, together with labor authorities "stack the deck" against "authentic" or independent unions who seek to represent worker interests more vigorously. Critics in the United States question the impartiality and fairness of union certification procedures in Mexico toward these independent unions. They claim there is an unholy alliance among labor authorities, the ruling party, major union federations and employers.

There is also a widely held belief in the United States that some union leaders in Mexico are corrupted by improper payments or favors from unscrupulous employers so they will agree to terms in collective negotiations less favorable to the workers they represent than otherwise would prevail, or that they use their power in other ways to enrich themselves while not attending to the needs of their members. This type of corruption -- they sometimes involve "sweetheart contracts" which give the workers little or nothing -- can occur also in the United States even though the laws prohibiting it

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[4] See W. B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law* (MIT Press) 1993, pages 169-170.

are clear. In the United States the statutes prohibit corruption in the financial affairs of unions, in the election of union officials and in dealings between employers and unions. Several prominent union leaders, and some employers as well, have served prison terms for violations of these laws.

A primary safeguard for worker rights in the United States is embodied in National Labor Relations Act provisions for a government supervised secret ballot election before a union is certified by the government to represent workers in a given bargaining unit. Unless a union represents a majority of the employees, and this can be demonstrated through signed union authorization cards or other indicia, it is unlawful for an employer to recognize a union and negotiate a contract with that union before a secret ballot election has occurred and the union certified. This helps to guarantee that the union recognized by the employer is also the choice of the employees.

Procedures for decertification elections are similar. If the workers of a particular employer are unhappy with the way their union is representing them, they may file a decertification petition with the National Labor Relations Board and, if legal requirements are satisfied, they are entitled to a secret ballot decertification election supervised by a Board agent. They may then choose to become unrepresented, to continue to be represented by the incumbent union or to be represented by another union, if such union has intervened in the proceeding. This process helps assure that unions are responsive to the wishes of their members, and that employees are not victimized by of sweetheart contracts.

We tend to judge others by the standards with which we are most familiar. U. S. practitioners of industrial relations believe that unions can best serve their members and perform their functions in the public interest when they are independent from the government and political parties and when they maintain an arms-length relationship with employers. By virtue of our own experience we tend to be uncomfortable with political systems dominated by a single party and giant unions whose officials are sometimes hard to distinguish from government authorities and party functionaries.

In conclusion, I want to make it clear that I am not suggesting here today that U.S. procedures are appropriate for Mexico or Canada. I do feel that all three countries, including not least of all the United States, cannot help but learn and benefit from a mutual and frank exchange with the others.

I welcome suggestions from any of the conferees for the problems we are experiencing in the United States which I have outlined here today. The success of the work of the delegates to this conference will do much to advance international labor standards, trade and economic progress, widely and equitably shared, throughout the hemisphere and the rest of the world.

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